Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

Workplace Safety and Insurance Appeals Tribunal

Quarterly Production and Activity Report

July 1 to September 30, 2014

Production Summary 2
Production Tables and Charts 3
Judicial Review Activity 8
Recent Decisions 13

Production Summary

At the end of the third quarter 2014, the active inventory totaled 8,667 appeals. This is approximately 3% higher than the active inventory at the end of the second quarter 2014.

Incoming Appeals

Incoming appeals for Q3-2014 numbered 1,217; of these, 1,122 were appeals from WSIB decisions, and 95 appellants advised they were ready to proceed to hearing following a period of inactive status. This is a decrease of 12% compared to Q2-2014. Comparisons to earlier quarters can be found in Table B.

The weekly average of hearing-ready appellants in Q3-2014 is 91. This figure excludes cases reactivated from inactive status, and is a 25% increase from 2013.

Dispositions

Dispositions in the third quarter of 2014 totaled 896. This includes 266 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 630 after-hearing dispositions; of the after-hearing dispositions, 609 followed from Tribunal decisions.

Inactive Inventory

At the end of Q3-2014, the inactive inventory was 2,149 cases. This represents a decrease of 3% from Q2-2014.

Decisions Released within 120 Days

For the year to date ending Q3-2014, 86% of final decisions were released within 120 days. Comparisons to earlier years can be found in section F: Production Charts.

The Notice of Appeal Process

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the third quarter of 2014, the notice inventory included 1,780 dormant cases, the active inventory totaled 8,667 cases, and the inactive inventory totaled 2,149 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2013	6235
Q2-2013	6675
Q3-2013	6966
Q4-2013	7436
Q1-2014	7969
Q2-2014	8393
Q3-2014	8667

B. Incoming Appeals

Period	Incoming Appeals
Q1-2013	1414
Q2-2013	1566
Q3-2013	1407
Q4-2013	1468
Q1-2014	1369
Q2-2014	1386
Q3-2014	1217

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2013	889	281	608
Q2-2013	975	281	694
Q3-2013	938	285	653
Q4-2013	944	305	639
Q1-2014	934	304	630
Q2-2014	993	302	691
Q3-2014	896	266	630

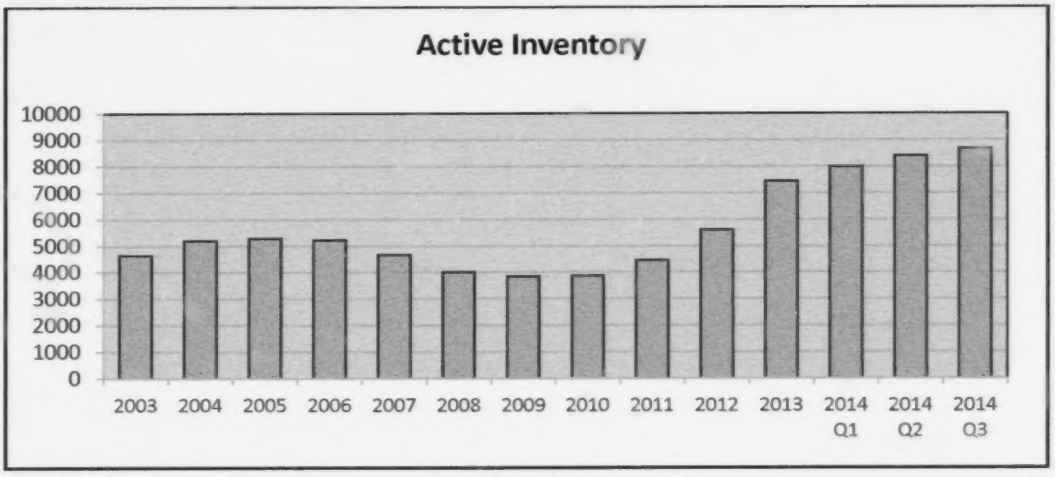
D. Inactive Inventory

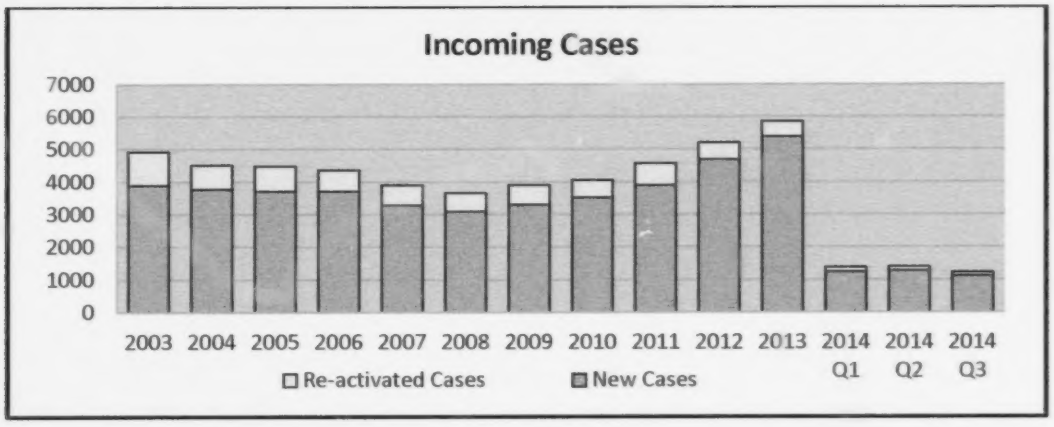
Period	Inactive Inventory
Q1-2013	2473
Q2-2013	2462
Q3-2013	2419
Q4-2013	2340
Q1-2014	2273
Q2-2014	2221
Q3-2014	2149

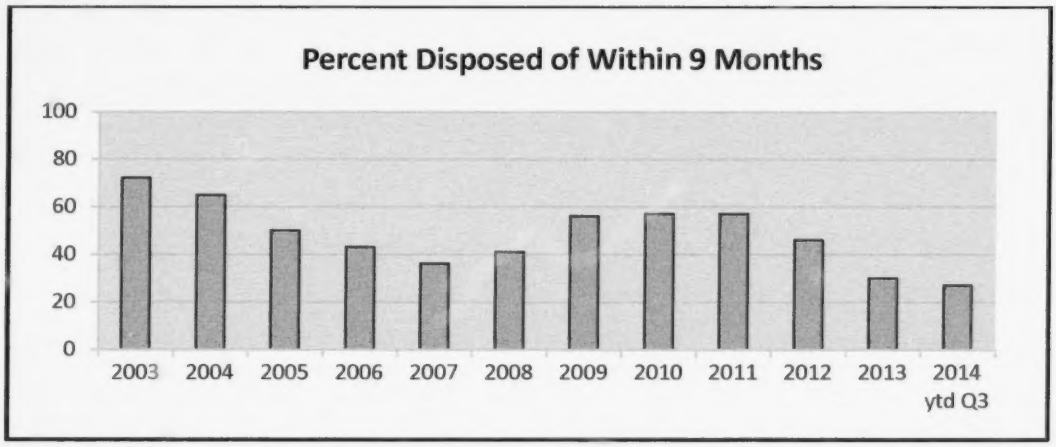
E. Notice of Appeal (Dormant cases)

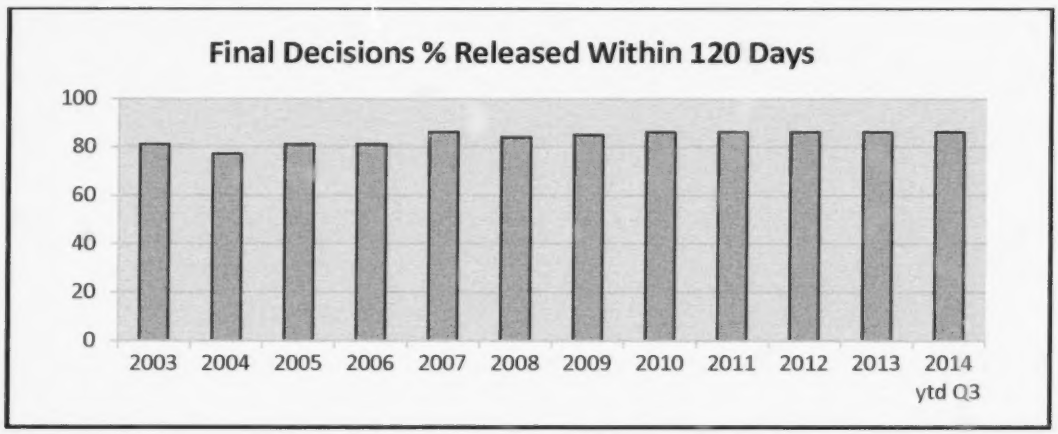
Period	Total Dormant	Change from Previous Quarter
Q1-2013	1479	-116
Q2-2013	1630	151
Q3-2013	1808	178
Q4-2013	1862	54
Q1-2014	1764	-98
Q2-2014	1733	-31
Q3-2014	1780	47

F. Production Charts: From 2003 to 2014






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014 ytd Q3


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014 ytd Q3

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the third quarter of 2014 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. *Decisions Nos. 512/06I* (May 12, 2006) and *512/06* (November 2, 2011)

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker loss of earnings benefits (LOE) until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date of the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002 for his back, and also for benefits for a right shoulder injury. In *Decision No. 512/06I*, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003 (which was two years after the injury) pursuant to s.43(1)(c) of the *Workplace Safety and Insurance Act* (WSIA).

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened s.15(1) of the *Canadian Charter of Rights and Freedoms* (Charter).

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as interveners. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. In *Decision No. 512/06*, the majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of s.15 the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates s.15 of the Charter to be (a) if the Act creates a distinction based on an enumerated ground and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65, that age 65 is still when most people retire and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would have worked after age 65 or

had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two year statutory limit. Further, a two year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as the Canadian Pension Plan (CPP). Viewed contextually, the majority found the two year limit does not perpetuate prejudice of workers aged 63 and older. Even if s.43(1)(c) did violate s.15 of the Charter, it constituted a reasonable limit under s.1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that s.43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that s.43(1)(c) was not saved under s.1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider *Decision No. 512/06*, while the judicial review was still pending. As the respondents objected to this approach as well, the worker decided to withdraw the judicial review and pursue a further reconsideration at the Tribunal. The respondents consented to the withdrawal, though the Tribunal insisted on payment of costs incurred from producing the Record.

The worker then filed a request for reconsideration of the WSIAT decisions. Since the original Tribunal Vice-Chair has passed away, a new Vice-Chair had to be assigned to hear the reconsideration.

The reconsideration was denied in *Decision No. 512/06R*, released December 10, 2013. The new Vice-Chair did not accept the worker's argument that there was substantial new evidence not available at the time of the hearing which would likely have changed the outcome of the decision.

In January 2014, the worker filed a new application for judicial review of *Decisions Nos. 512/06* and *512/06R*. The Tribunal has consented to IAVGO's request for intervenor status. The judicial review is expected to be heard at the end of 2014.

2. *Decision No. 1032/08* (June 27, 2012)

The worker, a miner, appealed for initial entitlement for a 1986 injury to his face, additional entitlement for his right shoulder from a 2004 accident, and LOE benefits after September 28, 2005.

The Panel allowed initial entitlement for the scar on the worker's face, but as it was not substantial or cosmetically offensive, there was no eligibility for compensation. The Panel denied entitlement for the worker's shoulder condition, as it was not caused by work, and confirmed the termination of LOE benefits as of September 28, 2005.

The worker has commenced an application for judicial review. The worker had counsel at the Tribunal hearing, but is now self-represented. Attempts to resolve issues relating to the materials the worker has submitted on judicial review were not successful. The Tribunal has filed its factum. The judicial review will be heard in Sudbury in October, 2014.

3. *Decisions Nos. 959/13* (June 13, 2013) and *959/13R* (October 31, 2013)

The worker's appeal for entitlement for non-economic loss benefits (NEL) for his low back, and to LOE benefits from August 17, 2010, was denied by the Tribunal Panel. The worker was a foreman with a paving company who injured his back at work in April, 2009. The Panel found that the worker's compensable condition resolved by the time the WSIB terminated LOE benefits in 2010, as the worker's non-compensable factors were responsible for his complaints. Further, the Panel found the worker had been offered suitable work at no wage loss.

The worker's application for reconsideration was denied. In the reconsideration decision, the same Vice-Chair clarified that there had been no ruling on the worker's potential psychological entitlement, so there was nothing that would preclude the worker from pursuing entitlement at the WSIB pursuant to the Chronic Pain or Psychotraumatic policies.

In December 2013, the worker commenced an application for judicial review. The Tribunal was preparing its responding factum, but counsel for the worker has requested that the Tribunal not file its factum until the worker has considered a further opportunity to obtain a ruling on psychological/chronic pain entitlement.

4. *Decision No. 1357/13* (September 12, 2013)

A family services worker became upset when she learned of the death of a three year-old client. The worker had an emotional reaction to the news and claimed she was unable to return to work. The Board denied entitlement for traumatic mental stress. The worker appealed to the Tribunal.

The Panel found the worker was entitled to benefit for traumatic mental stress, as she had suffered an acute reaction to a sudden an unexpected traumatic event (the sudden and unexpected death of a three year-old child) while she was in the course of employment.

Further, the way the worker learned of the death (through a phone call) exacerbated the shock. The worker was also concerned about potential personal liability. Eventually, she was unable to continue in her job.

In accordance with Board policy, the Panel also found the triggering event was identifiable, objectively traumatic, and unexpected in the normal course of employment.

Finally, the Panel found the worker's acute reaction led to a psychological injury, causing the worker's loss of earnings. The Panel directed the Board to assess the worker's entitlement to benefits.

The employer commenced an application for judicial review. At the end of the quarter, the Tribunal was in the process of preparing its responding factum.

5. *Decisions Nos. 1135/12* (May 9, 2013) and *1135/13R* (December 16, 2013)

An apprentice who worked for an auto repair shop helped his employer deliver a derelict vehicle to a recycling/scrap dealer. This worker steered the vehicle down a public street while being pushed from behind by his employer's vehicle. Once they arrived at the scrap yard, the worker remained in the derelict vehicle while a bobcat pushed it on to a weigh scale. Due to a failure to communicate, when the bobcat pushed the vehicle off the scale it was immediately crushed by a crane while the worker was still inside. The worker suffered serious injuries. The worker commenced an action against the scrap yard, and three employees of the scrap yard. These defendants then commenced a third party action against the worker's employer.

The worker received statutory accident benefits (SABs). The insurance company which provided these benefits, and those of the third parties, applied to the Tribunal under s.31 of the WSIA for a determination of whether the worker's rights of action was taken away. The only issue was whether the worker and the three workers of the scrap yard were in the course of their employment when the accident occurred.

The Vice-Chair found that both the worker and the defendant's employees were in the course of their employment when the accident happened. In coming to his conclusion, the Vice-Chair relied on the definition of accident in the WSIA, Board policy and the "work-relatedness test" which involves the examination of a number of factors to determine whether a worker was in the course of employment.

The lawsuit brought by the worker was barred by s.28 of the WSIA and the grounds for the third party action no longer existed. Consequently, the worker was entitled to benefits from the insurance plan

The worker commenced an application for judicial review. The Tribunal has filed its responding factum. The judicial review will be heard in April, 2015.

6. *Decision No. 2214/13* (March 21, 2014)

In 1967, the worker, then employed as a police officer, suffered injuries to his upper body when he was attacked by a prisoner. He left the police two years later. He then embarked on a career operating garages, working for a truck rental company, and as a millwright. He was involved in a motor vehicle accident in 1973, and suffered a number of work accidents including various low back injuries. The WSIB denied ongoing entitlement for the low back, and initial entitlement for the neck, shoulders and arms. The worker appealed to the Tribunal.

The pre-1985 Act applied to the worker's appeal.

The Panel held the worker did not have ongoing entitlement for the low back or shoulders as a result of the 1967 accident. However, the Panel found the 1967 accident caused a temporary aggravation of a pre-existing back and neck condition.

The worker, who is self-represented, has commenced an application for judicial review. The Tribunal has asked the worker to confirm whether he will be providing the transcript of the Tribunal hearing, at which time the Tribunal will file its Record of Proceedings. In June 2014, the worker asked the Tribunal to post-pone its activities related to the judicial review application so that he could receive legal direction from the OWA regarding his

application. The Tribunal agreed to the worker's request and is waiting for the worker to confirm his next steps before proceeding with filing its Record of Proceedings.

7. *Decisions Nos. 2175/10* (November 9, 2010) and *2175/10R* (July 5, 2011)

The worker appealed for initial entitlement for specific injuries to both knees. The employer claimed the worker had knee problems when the worker was hired, that the worker did not report the injury, and that his knee problems were not related to work. After hearing testimony from a number of witnesses and reviewing the medical evidence, the Vice-Chair denied the appeal. She found significant discrepancies about the date of the accident, whether the accident was reported and the nature of the injuries.

The worker commenced an application for judicial review. The worker filed an affidavit with his factum, to which the Tribunal objected. The judicial review was scheduled to be heard on February 28, 2013.

However, following discussions with the worker's counsel, the judicial review was adjourned sine die on consent. *Decision No. 2175/10* explicitly made a finding based only on whether there was entitlement on the basis of a "chance event."

The worker is returning to the Board for a decision on whether there is entitlement on the basis of "disablement." If the worker is satisfied with the ruling of the Board (and if necessary, the Tribunal) on the issue of disablement, the judicial review will be abandoned.

The worker received a final decision from the Board denying entitlement for disablement. The worker has appealed this issue to the Tribunal. It is scheduled to be heard on November 13, 2014. Once a decision is made, the worker will decide whether to pursue the judicial review application.

Action in Superior Court - *Decision Nos. 691/05* (February 11, 2008) and *691/05R* (June 13, 2013)

Following four days of hearing, the Panel allowed this self-represented worker's appeal in part. The worker was granted initial entitlement to benefits for his neck, and for various periods of temporary partial disability benefits. He was denied initial entitlement for an injury to his upper and mid-back; for a permanent impairment for his upper, mid-back and neck; for labour market re-entry (LMR); and for reimbursement of travel expenses. The WSIB's determination of the worker's future economic loss (FEL) and his supplemental employee benefits (SEB) were found to be correct.

In July 2013, the Tribunal and the Board were served with a Notice of Application, issued out of the Superior Court of Justice, asking that *Decisions Nos. 691/05* and *691/05R* be set aside. The Tribunal wrote to the worker to advise that he had clearly commenced proceedings in the wrong court. If he wanted to challenge the Tribunal's decisions, he was required to bring an application for judicial review in the Divisional Court. The Tribunal further advised the worker that if he did not immediately file a Notice of Abandonment, the Tribunal would bring a motion to dismiss the application.

The worker abandoned his action in August, 2013.

In February 2014, the worker commenced a new action against the WSIB and the Tribunal, this time claiming relief of over six million dollars. Much of the claim contains allegations against the WSIB, but the claim also takes issue with the Tribunal's decisions, alleging errors and bad faith. It alleged the worker had been threatened by one of the Panel members. The worker also served the Tribunal with what appears to be a surreptitious recording.

The Tribunal and the Board are bringing motions to dismiss the worker's action. The worker said he would bring a motion before then on an urgent basis, apparently to seek an order granting him interim benefits. However, the worker's motion never materialized. The motion to dismiss is expected to be heard in October, 2014.

Recent Decisions

LOE following termination

Decision No. 904/14 contains a good review of Tribunal cases considering entitlement to LOE benefits after termination. The worker had a compensable back disability and was fired from modified work because, in the employer's view, he participated in a theft.

There are generally two approaches in Tribunal decisions. In the first, entitlement to benefits after termination turns upon whether there is an anti-injured worker animus. If this exists, the worker is generally entitled to a review of LOE entitlement. If this does not exist, LOE is not payable because the loss of earnings is not due to the work injury. In the second, the emphasis is on whether, after the termination, the injury continues to make a significant contribution to the worker's wage loss, or whether the termination was an intervening event breaking the chain of causation. The worker's conduct is relevant. Recent decisions have tended to follow this approach.

The Panel agreed with the second approach. The focus should be on the worker's conduct prior to termination. If the conduct was inconsistent with the worker's responsibility to act reasonably to minimize post-injury wage loss and resulted in the loss of the work, the work will still be considered available for LOE purposes. If the conduct was not inconsistent with this responsibility, the wage loss is considered to be due to the worker's injury. This does not require the application of labour relations concepts or wrongful dismissal criteria.

The Panel found that the evidence did not establish that the worker stole the item in issue. He therefore, did not bring about his dismissal through unreasonable behaviour. He was not responsible for the lack of availability of employment and was entitled to a Labour Market Re-entry (LMR) assessment and to LOE.

Earnings basis for survivor's benefits under WSIA

Decision No. 1269/14 contains an interesting discussion of the earnings basis for survivor's benefits. The worker died of cancer in 2000 at age 57 due to his exposures as a firefighter. He had ceased firefighting in 1980 and did different work until he was laid off in April 1999. He was seeking work when he was diagnosed on December 1, 1999.

The Board determined that the accident date was December 1, 1999 and that the worker had not removed himself from the workforce at the time of diagnosis. LOE was paid until his death, based on his earnings from his most recent employer. However, the Board based his widow's survivor's benefits under s.48 on the annual earnings of a first class firefighter in December

1999. At the Tribunal, the widow relied on Board policy that states that in long-latency occupational disease claims, average earnings are based on the greater of the annual earnings of a fully qualified worker at the time of diagnosis engaged in the same occupation to which the worker's disease is due, or the worker's annual earnings in the 12 months prior to the accident date.

The Vice-Chair reviewed Tribunal decisions considering the application of ss.43, 48 and 53 of WSIA in the context of a retired worker with no intention of returning to work who dies of an occupational disease. These cases have generally found that there is no wage loss and no LOE entitlement. Survivor's benefits are based on the statutory minimum in s.48 and the long-latency occupational disease provisions of the policy do not apply.

The Vice-Chair concluded that the same rationale applied to the worker's situation. Average earnings should be based on earnings in the work performed in the years prior to the diagnosis. The Board's LOE decision was reasonable.

With respect to survivor's benefits, the Vice-Chair agreed with Tribunal case law that the calculation of a worker's average earnings under s.53 provides for the calculation of a worker's average earnings for all the purposes of the WSIA, including the calculation of LOE under s.43 and of survivor's benefits under s.48. The long-latency diseases provisions of the policy do not apply to a worker who has not worked for many years in the occupation that caused his illness. The survivor's benefits were also based on the worker's earnings at his last employer.

Re-employment obligations

Decision No. 851/14 considered whether an employer breached the re-employment provisions in s. 41 of the WSIA, and if so, whether the worker was entitled to benefits and LMR. The worker permanently injured his back and neck at work and was unable to perform the essential duties of his pre-accident job.

The Vice-Chair concluded that the employer did not fulfill its statutory obligation to offer the worker, when he was medically able to perform suitable work, the first opportunity to accept suitable available work. The employer told the Board that it did not have suitable work available. The employer was a large international shipping company with several offices and thousands of employees. There were various jobs that the worker could have performed, but these were not offered. The Act requires the employer to accommodate the worker to the extent that the accommodation does not cause undue hardship. There was no evidence that providing suitable work would have resulted in undue hardship.

Since the employer breached its re-employment obligation, under s.41(13) the worker was entitled to full LOE payments for one year as if he was entitled to those payments under s.43. The worker was not entitled to further LMR services as those already provided were sufficient given his transferrable skills, education, and the fact that he had been offered jobs in his SEB. The issue of any penalty for the employer was not before the Vice-Chair and was remitted to the Board.

Transfer of costs

The Panel in *Decision No. 62/14* had to determine the degree of negligence of an employer for the purposes of deciding the extent of a cost transfer. Section 84 of the WSIA provides if an

accident causing injury to a Schedule 1 worker was caused by the negligence of another Schedule 1 worker then all or part of the claim costs can be charged to the negligent employer.

The appellant accident employer's worker was injured when hit by drywall falling from above while he was working in an elevator pit below. The respondent employer was the drywall company. The accident occurred when the drywallers were supposed to be at lunch, at which time the worker was authorized to enter the elevator pit. Someone called "heads up" from above, and then the drywall fell. There were no danger signs posted at the pit; there was no prohibition to work there. The respondent's worker had removed a safety rail which would have stopped the drywall from falling. The Board transferred 50% of the costs to the respondent.

After reviewing Tribunal case law, the Panel transferred 100% of the costs to the respondent employer. The evidence established that the respondent's workers were fully aware that the worker was working below, yet there were neither barriers nor guard rails. The respondent's failure to install these was the proximate cause of the accident. The *Occupational Health and Safety Act* (OHSA) and its regulations place responsibility for safety on the party working above to protect those below from falling debris. The appellant's workers acted reasonably and their actions did not shift the responsibility for safety from the respondents who were working above them. While the appellant argued that the doctrine of res ipsa loquitur applied, the Panel noted that that the Supreme Court of Canada has declined to apply this doctrine, and this approach has been followed in Tribunal case law.

Retroactivity of change in classification

In *Decision No. 1549/14*, the employer sought to increase the retroactivity of a re-classification, relying on Board's merits and justice policy. The employer registered in 2007 and was placed in "Finished Carpentry." In 2012, the Board audited the employer and re-classified it into another rate group with lower premiums. This re-classification was effective January 1, 2012 in accordance with the retroactivity specified in Board's policy on employer premium adjustments. The auditor also found that the employer had significantly underreported its gross payroll in 2010 and 2011. This resulted in an additional amount being added to the employer's account in those years, and the employer having to pay additional premiums on the basis of the higher premiums in its first classification.

The employer asked that the re-classification be retroactive to 2010 and 2011. The merits and justice policy states that there may be cases in which the application of a policy leads to an absurd or unfair result which the Board never intended, and that a decision-maker can depart from a policy if exceptional circumstances justify so doing. The Panel found that it was not appropriate to rely on this policy to override the clear and intended result of the employer premium adjustment policy. The fact that an employer might have to pay premiums with respect to rate group into which it was improperly classified was not an absurd or unfair result that the Board never intended. The clear intention of the policy is that in the interest of administrative efficiency, rate group adjustments would be limited in the prescribed manner.

The Tribunal has relied on the merits and adjustment policy to extend the limit on retroactive adjustments where there is an egregious error by the Board. In this case it was unclear that the Board made an error in its original classification as the information about the employer's business was provided by the employer to the Board. Even if the Board did err, this was not the kind of egregious error that would attract relief as exceptional circumstances. At worst, it was an error of judgment typical of the administration of any compensation system.

Finally, this was not a case in which the equities called out for relief, given that that the Board did not require the employer to pay higher premiums on its grossly underreported payroll prior to 2010.

WSIAT
[October 2014]